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CASE NO.
1-02-107
(Consol. with
C-1-02-108 and
C-1-02-135)

ORIGINAL

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1 BRUCE A. BELL, Ph.D., P.E.
2 of lawful age, a witness herein, being first duly sworn as
3 hereinafter certified, was examined and deposed as follows:

4 CROSS-EXAMINATION

5 BY MR. BUCKLEY:

6 Q. Good morning, Dr. Bell.

7 A. Good morning.

8 Q. Would you state your name and home address for
9 the record, please?

10 A. My name is Bruce A. Bell. And the address is
11 14 Roanake Drive, Monroe, New York.

12 Q. Are you on any drugs or medications, sir, that
13 would inhibit your ability to testify today?

14 A. No.

15 Q. Do you have any other conditions that would in
16 any way inhibit your ability to testify today?

17 A. No.

18 Q. Okay. I'm just going to give you a few
19 standard suggestions. First of all, if I ask you a
20 question and you don't understand it -- and given the
21 technical nature of this, I may well not articulate a
22 question very well -- be sure to let me know, and I'll try
23 to rephrase the question.

24 You need to answer audibly, as I'm sure you

1 not adequate to eliminate the SSO which was intended to be
2 eliminated. Would you -- what is your view with respect to
3 whether a request to change the design of that project
4 would be appropriate?

5 A. I would believe that if you could make a
6 demonstration that it would not work as opposed to that
7 there's a better, cheaper way to do it, I think any
8 rational person would make that request whether the consent
9 decree said so or not.

10 Q. Let's go back to your first declaration. And
11 I'd like to refer you specifically to paragraph 12. You
12 say in paragraph 12 of your first declaration that there is
13 a technologically feasible and simple remedy to prevent the
14 capacity-related SSOs that's been available in your direct
15 experience for over 30 years. Defendants could have simply
16 built sewers and treatment plants that were of adequate
17 size for the wet weather flow that actually occurs.

18 That's what you said, correct?

19 A. Yes.

20 Q. And I take it your position is that they didn't
21 build sewers and treatment plants that were of adequate
22 size for the wet weather flows that actually occur?

23 A. My position is they either didn't build them of
24 adequate size in the first place, which I believe from some

1 of the things I've seen Mr. Karney's has written or said
2 that MSD believes that, or that they failed to upgrade them
3 along the way in terms of capacity, either due to letting
4 I&I build up or rainfall-induced I&I build up, or simple
5 growth.

6 Q. Okay. I noticed in paragraph 12 a shift in the
7 tense. You said there is a technologically feasible
8 solution, and then you talked about what they could have
9 done or didn't do.

10 A. Or could do tomorrow.

11 Q. But we are today where we are today in terms of
12 the configuration of this system?

13 A. Right, and that technologically feasible
14 solution exists today, go out and build -- go out and get
15 the right-sized sewers.

16 Q. What is that technologically feasible solution
17 today, go out and rebuild the whole system?

18 A. One could, if one wanted to. I don't know why
19 one would, but one could do that.

20 Q. Do you have any idea what that would cost?

21 A. No.

22 Q. Do you have any idea how long it would take?

23 A. No.

24 Q. Do you have any idea how many additional

1 treatment plants would have to be built?

2 A. No.

3 Q. Do you have -- have you analyzed any of these
4 things, the time line or the design or the cost of doing
5 that?

6 A. No, I have not.

7 Q. Given that we are where we are, do you think
8 that the use of the systemwide hydraulic model is a good
9 idea to seek to determine how best to solve the problem on
10 a systemwide basis?

11 A. I believe that given where we are that we are
12 where we are, that you have a 2001 plan and identification
13 of projects based on previous modelling and other things.
14 That is a solution to this problem. That -- in my view,
15 that waiting and delaying things to do more modelling is a
16 never-ending process, and that this process is going to
17 take a fair amount of time regardless because you can't
18 build things overnight. And that, in my view, the best way
19 to handle things would simply be to start building what you
20 have, do whatever modelling you want while it's going on
21 and modify down the road.

22 Q. When you start building what you have, are you
23 referring to the projects that are listed on Exhibit 3?

24 A. No, I'm referring to the projects that are

1 it could be done within five years, correct?

2 A. Yes.

3 Q. But it couldn't be done by tomorrow, could it?

4 A. No.

5 Q. Couldn't be done in a year?

6 A. I would sure doubt it.

7 Q. Is it your view that that facility cannot be
8 allowed -- that that situation cannot be allowed at SSO 700
9 because until that facility is built there is not secondary
10 treatment there?

11 A. I'm sorry, I'm missing that one.

12 Q. Well, the fact is, isn't it, that even if
13 secondary treatment were built there and even if a facility
14 were built within five years, as you have indicated it can,
15 you would have a certain period of time when there would be
16 no secondary treatment there, right?

17 A. Yes.

18 Q. So is it your view that that cannot be allowed
19 either by EPA or a court?

20 A. No.

21 MR. SLAP: Again, same objection.

22 Q. Because it is true, isn't it, if you have a
23 system that is out of compliance in some respect, and
24 pursuant to a consent decree or for whatever other reason,

1 a solution to that problem is found and implemented, it's
2 going to take a period of time to implement it, correct?

3 A. Usually, yeah.

4 Q. And therefore that system would remain out of
5 compliance until the solution is implemented, correct?

6 A. Yes.

7 Q. Let's talk about your testimony that a
8 secondary plant could be constructed at SSO 700 within five
9 years. The first time you saw SSO 700 was yesterday,
10 correct?

11 A. Yes.

12 Q. Have you done any analysis of the -- of a
13 secondary plant -- possibility of having a secondary plant
14 at SSO 700 within the -- given the circumstances of that
15 site as part of your project? Have you done any analysis
16 of the design of the secondary treatment facility?

17 A. I have not designed a secondary treatment
18 facility, no.

19 Q. Have you done any analysis of the permitting
20 that would be required or how long it would take?

21 A. I certainly know what permitting would be
22 required. How long it would take? If MSD does a good
23 permit application and if Ohio EPA wanted to move the
24 permit along, it would probably take in the order of three

1 Q. And how many instances in the last ten years
2 has the United States Environmental Protection Agency and
3 the United States Department of Justice imposed a
4 moratoria?

5 A. I don't know.

6 Q. Have you made any effort to determine that?

7 A. No.

8 Q. In how many instance in the last ten years has
9 either Ohio EPA or the United States Environmental
10 Protection Agency imposed a moratorium in the State of
11 Ohio?

12 A. I don't know.

13 Q. Have you made any effort to determine that?

14 A. No.

15 Q. How about United States EPA within Region 5 of
16 EPA?

17 A. No.

18 Q. You don't -- you haven't made any effort to
19 determine that?

20 A. No.

21 Q. Okay. Let's talk about the Little Rock
22 lawsuit. Tell me what you remember about the background of
23 that case. Who were the defendants?

24 A. The defendant in the -- sort of a complicated

1 mess, but the Little Rock sewer committee was one
2 defendant. And, actually, I think it was under the same
3 action, I'm not positive, the City of Little Rock as
4 regards to SSOs.

5 Q. And was the sewer committee, in fact, a
6 five-person lay board of the utility?

7 A. I don't remember how many people were on the
8 board.

9 Q. But was it a citizen board?

10 A. I believe it was an appointed board by the -- I
11 think the city appoints the members. I really don't know.

12 Q. But they are -- regardless of how many or how
13 they are appointed, they're associated with the utility,
14 correct?

15 A. Yes.

16 Q. And was the other defendant the City of Little
17 Rock?

18 A. Yes.

19 Q. And was the sewer authority through the
20 five-person -- through the committee sued with respect to
21 SSOs?

22 A. Yes.

23 Q. And was the city sued with respect to storm
24 water problems?

1 A. With respect to -- under the storm water
2 permit, one of the issues in the lawsuit with the city was
3 to effectively prohibit SSOs.

4 Q. So SSOs were at issue with respect to the city
5 as well?

6 A. Yes.

7 Q. So it would be fair to say that SSOs were
8 involved in that case both with respect to the utility as a
9 defendant and the city as a defendant?

10 A. It would be fair to say they were both
11 involved. My understanding was that the city's involvement
12 or what came out of the city's involvement was
13 essentially -- and I don't know how to say this properly,
14 legally, but stay out of the utility's way in implementing
15 its -- its obligation under the consent decree, because my
16 understanding was that the city had significant control
17 over the utility's budget.

18 Q. The case against the utility was settled,
19 wasn't it?

20 A. Yes, it was.

21 Q. Okay. Is the case against the city still
22 pending?

23 A. My understanding is, and this is basically just
24 what I've been told, that the judge made a ruling based on

1 paper that the city -- and, again, I don't know whether
2 it's an order or what it is, but the city was essentially
3 told, look, stay out of the way of the sewer committee,
4 don't mess up what they agreed to do.

5 The storm water part of that case, as I talked
6 earlier, went to a one-day trial, and my understanding
7 is -- or at least I've not heard a ruling on it.

8 Q. When was your last involvement in the case?

9 A. That one-day trial, oh, which was last summer,
10 I think.

11 Q. Okay. Now, with respect to -- I'm sorry.

12 A. I'm trying to remember. We reviewed somewhere
13 in that same time frame -- and I don't remember quite
14 frankly whether it was before that trial or after that
15 trial, so I don't know which was last -- we were asked to
16 review the capacity assurance plan that came under the
17 consent decree for our clients. And I can't -- I honestly
18 can't tell you whether that was a few months before the
19 trial or a few months after.

20 Q. Who reviewed it?

21 A. I did, with some help from Steve Garabed.

22 Q. And what was your conclusion?

23 A. That fundamentally it was fine.

24 Q. When was the case against the utility settled,

1 to the best of your recollection?

2 A. Best of my recollection, which isn't all that
3 good, would be the late 2000, early 2001.

4 Q. Did you have a hand in that settlement? Were
5 you involved in the negotiation?

6 A. Yes.

7 Q. And how were you involved?

8 A. I was involved in -- in working with Sierra
9 Club's lawyer as to they should -- you know, what, from a
10 technical standpoint, would make a good settlement. I was
11 involved in going down once or twice, which I can't
12 remember, to meet with the folks from the utility.

13 Q. So you were involved with settlement -- in
14 settlement meetings?

15 A. In settlement meetings, yes.

16 Q. Did you have any meetings with the United
17 States Department of Justice or the United States
18 Environmental Protection Agency with respect to that
19 settlement?

20 A. I did not, no.

21 Q. Now, the settlement was unopposed by the
22 Department of Justice, United States Department of Justice,
23 correct?

24 A. I know it was entered. I assume it was

1 unopposed, but I don't know.

2 Q. It was entered as a consent judgment by a
3 federal judge, wasn't it?

4 A. Yes.

5 Q. And it was entered as a consent judgment by a
6 federal judge line by line? In other words, the agreement
7 as reached between the Sierra Club and the utility was
8 entered as a consent judgment, correct?

9 A. Yes.

10 Q. Did you believe that the settlement was a good
11 one?

12 A. I believed from a technical standpoint it was a
13 pretty good settlement. The rest of it I just didn't have
14 an opinion on.

15 Q. You didn't? You never testified under oath
16 that it was a fair settlement?

17 A. If I did, I did. But I -- my memory is I was
18 asked about the technical parts of it and the technical
19 parts is what I thought were fine. And, frankly, I
20 couldn't tell you what the money parts of it were. And I
21 guess the money parts would have been fine with me whatever
22 they were.

23 Q. Did you testify under oath that as far as you
24 were concerned, it should be approved by the United States

1 Department of Justice and the United States Environmental
2 Protection Agency?

3 A. To tell the you the truth, I don't remember
4 saying that, but certainly that was my opinion.

5 Q. Did you testify under oath that you would
6 recommend approval of it to the Department of Justice and
7 the Environmental Protection Agency if they asked you about
8 it?

9 A. Again, I don't remember testifying to it, but I
10 would have.

11 Q. Did you have any involvement in the
12 administration of the settlement decree?

13 A. Can you define "administration" for me?

14 Q. Did you have any involvement in implementation
15 of the settlement decree?

16 A. Well, I just told you that we did review the
17 capacity assurance plan. Whether that's -- fits your
18 definition of implementation, I don't know. That's the
19 only thing we've dealt with.

20 Q. In fact, didn't the settlement agreement
21 require that you review the study and the results of the
22 study?

23 A. I can't remember whether we were in there by
24 name or the Sierra Club was, but we did.

1 Q. In fact, wasn't the Sierra Club paid \$5,000 for
2 you to do that?

3 A. May have been.

4 Q. You don't know?

5 A. I don't remember. I know we were asked to do
6 it. I know we did it. I know we got paid to do it.

7 (Plaintiffs' Exhibit 13 was marked for
8 identification.)

9 Q. Okay. All right. Let me show you what's been
10 marked as Exhibit 13. Exhibit 13 is a judgment entered by
11 a federal court, United States District Court, Eastern
12 District of Arkansas, signed by a federal judge whose name
13 I can't make out. Do you recall who the judge was in the
14 case?

15 A. No, I don't. In fact, the copy I have doesn't
16 have the judge's signature on it.

17 Q. Okay. Which enters a consent judgment of
18 settlement agreement between the Sierra Club and the Little
19 Rock Sanitary Sewer Committee. This is the settlement
20 agreement we're talking about, isn't it?

21 A. Yes.

22 Q. Okay. You've seen this before, correct?

23 A. I have.

24 Q. And this was signed by the Sierra Club and by

1 the utility, correct?

2 A. Yes.

3 Q. Have you seen the judgment before, which is the
4 first two pages?

5 A. I don't think so.

6 Q. Okay.

7 (Plaintiffs' Exhibit 14 was marked for
8 identification.)

9 Q. The next exhibit -- is it 14 -- has been marked
10 as Exhibit 14. It is a letter from the United States
11 Department of Justice dated November 2nd, 2001. Have you
12 ever seen this letter before?

13 A. No, I haven't.

14 Q. Were you aware of the fact that the -- the
15 Department of Justice was troubled by two of the SEPs,
16 supplemental environmental projects, that were embodied in
17 the consent decree --

18 A. No.

19 Q. -- specifically relating to creation of bike
20 paths and construction of a golf course? Were you aware
21 that there was any controversy with respect to those two
22 projects as SEPs?

23 A. No.

24 Q. Were you involved in any way in the selection

1 of those projects as SEPs?

2 (Off the record.)

3 A. No.

4 (Defendant's Exhibit 15 was marked
5 identification.)

6 Q. Okay. All right. Sir, I've had marked as
7 Exhibit 15 the oral deposition of Bruce A. Bell taken in
8 Little Rock, Arkansas on October 8th, 2001. Is this, sir,
9 your deposition in the Little Rock case?

10 A. I believe it probably is. Looks like it.

11 Q. Okay. It was taken under oath, wasn't it?

12 A. Sure.

13 Q. Was the testimony you gave truthful?

14 A. To the best of my ability, I'm sure it was.

15 Q. After your testimony was taken, was the
16 transcript furnished to you and reviewed by you?

17 A. If memory serves, it was.

18 Q. I'm sorry?

19 A. If memory serves, it was.

20 Q. Did you sign it?

21 A. By memory, I think I did.

22 Q. Well, take a look at it. Is that your
23 signature?

24 A. Okay. Then I did, yes.

1 Q. In fact, did you make certain corrections to
2 it?

3 A. Yes, I did.

4 Q. To the best of your recollection as you sit
5 here today, and I recognize that this deposition was taken
6 some time ago, was any of your testimony incorrect?

7 A. To the best of my recollection, it was not.

8 Q. Now, I'd refer you to page -- I refer you, sir,
9 to page 245 of your transcript. Specifically starting at
10 line 8, and I'm quoting, QUESTION: And we've questioned
11 (sic) the settlement agreement with the utility on several
12 occasions. Do you think that the current settlement
13 agreement that has been sent to the Department of Justice
14 is a fair agreement?

15 ANSWER: I think so.

16 That was your testimony, was it not, sir?

17 A. Yes, it was.

18 Q. And I refer you over to page 252 and 253
19 beginning at page -- I'm sorry, beginning at page 252, line
20 24. QUESTION: You characterized the settlement agreement
21 between the utility and the Sierra Club, the plaintiff, as
22 a fair agreement?

23 ANSWER: I believe it is.

24 That was your testimony, wasn't it?

1 A. Yes.

2 Q. QUESTION: Do you have an opinion as to whether
3 or not that settlement agreement should be approved by the
4 Department of Justice?

5 ANSWER: I don't know that my opinion matters
6 at that. But my experience with Justice -- I think it
7 should be, and I -- the only issue that I can imagine them
8 commenting on it is actually the SEPs and that's because
9 they have their own crazy rules for supplemental
10 environmental projects, and they go down their checklists.

11 And you know, I didn't spend a lot of time
12 reading them. But what I read of them seemed like they'd
13 worked -- similar to things that have worked in the past.
14 So I can't imagine why they wouldn't approve it.

15 But I -- certainly if they were to ask me --
16 and they won't -- I would recommend it.

17 That was your testimony, wasn't it?

18 A. Yeah.

19 Q. Now, let's take a look at the settlement
20 agreement. I believe you testified that it was signed by
21 the Sierra Club, correct?

22 A. I think you testified it was signed by the
23 Sierra Club. But I imagine if it was entered, it was
24 signed by the Sierra Club.

1 Q. Okay. Now, there's a definition in this
2 agreement of a design storm event, is there not, on pages 3
3 and 4?

4 A. Yes.

5 Q. Is that essentially a two-year storm?

6 A. It's close to a two-year storm, yes.

7 Q. Okay. And is it fair to state that there was
8 no need to eliminate SSOs under this decree that resulted
9 from larger than whatever that design storm was?

10 A. Yes.

11 Q. The consent decree envisioned a study of
12 capacity, did it not?

13 A. Yes.

14 Q. And it was -- the study was related to SSOs,
15 correct?

16 A. Yes.

17 Q. Okay. But there wasn't any deadline set in
18 this decree itself, was there?

19 A. As I recall -- I'd have to read the whole
20 decree, but as I recall, there was a deadline for the
21 study. There was a requirement to build to what was in the
22 study. The schedule was left to the study dispute
23 resolution mechanism if the two sides could not agree on
24 the timetable.

1 Q. Right. But there was no implementation
2 deadline in this decree, was there, directly?

3 A. Directly, no.

4 Q. And, in fact, the Sierra Club was to be paid
5 \$5,000 to cover a review of this study and suggested
6 compliance deadline to be conducted by you, correct?

7 A. Yes.

8 Q. And regarding maintenance, the utility was to
9 clean all SSOs pursuant to its established procedures,
10 correct?

11 A. Yes.

12 Q. Quote, as conditions allow, close quote,
13 correct?

14 A. Yes.

15 Q. There were no penalties for past violations
16 embodied in this decree, were there?

17 A. I think they were done as SEPs.

18 Q. So the only penalties -- the only -- there were
19 no dollar penalties assessed. There were a certain number
20 of SEPs that were embodied in this decree? Yes?

21 A. Yes.

22 Q. And there were no stipulated penalties in this
23 decree either, were there?

24 A. No.

1 Q. And there was no moratorium imposed by this
2 decree, was there?

3 A. No.

4 Q. And, in fact, the Sierra Club released the
5 utility from any violations of its two NPDES permits
6 resulting from capacity-related SSOs up to the compliance
7 deadline, whenever that deadline would end up being,
8 correct?

9 A. That's my understanding.

10 Q. And, in fact, this is a full and final
11 settlement of the Sierra Club's claims in the lawsuit and a
12 resolution of all allegations through the termination date
13 of the settlement agreement, correct?

14 A. That's my understanding.

15 Q. And, in fact, this settlement agreement was a
16 complete and full remedy for all SSOs that occurred prior
17 to the settlement agreement's effective date, correct?

18 A. Again, I am not reading that. I assume it is.

19 Q. And the settlement agreement was also a
20 complete and full remedy for all SSOs that would occur
21 after the effective date but prior to the termination date,
22 correct?

23 A. If you -- if you want me to find it, I'll read
24 it, but I honestly don't remember. This is law stuff, and

1 I don't do the law stuff.

2 Q. All right. Well, take a look at paragraph 27
3 on pages 27 and -- I'm sorry, paragraph 27 on pages 28 and
4 29. Were you aware of the provisions of that paragraph --

5 A. No.

6 Q. -- paragraph 27?

7 A. No.

8 Q. Do you recall that you testified in your
9 deposition in the Little Rock case that you need to know in
10 designing the system what the design storm is?

11 A. Do I remember doing it?

12 Q. Yes.

13 A. No.

14 Q. You agree with that statement?

15 A. Yes.

16 Q. Do you recall testifying in the case that you
17 cannot have 0 SSOs?

18 A. I believe that -- I don't remember doing it,
19 but it wouldn't surprise me if I did.

20 Q. Do you agree with that?

21 A. I think unless you are a heck of a lucky
22 person, that's true.

23 Q. Do you recall testifying in your deposition
24 that the utility needs to integrate fixes for SSOs, CSOs,

1 storm water and wastewater treatment plant discharges,
2 particularly with urban watersheds?

3 A. Do I remember? No.

4 Q. Would you disagree with that?

5 A. No.

6 Q. Do you recall testifying in your deposition in
7 the Little Rock case that once a basement backup is cleaned
8 up, it's not much of an issue?

9 A. No.

10 Q. Would you disagree with that?

11 A. If it's properly cleaned up, that's true.

12 Q. Do you recall in the Little Rock case that you
13 used benchmarking for a number of SSOs but not with respect
14 to O&M?

15 A. No.

16 Q. You don't remember that?

17 A. No.

18 Q. Do you remember using the Black & Veatch
19 studies, the benchmarking studies, for the number of SSOs?

20 A. I remember having the Black & Veatch studies.
21 I can't remember how I used them.

22 Q. You can't remember how you used them in Little
23 Rock?

24 A. No.

1 Q. Do you recall whether your deposition included
2 discussion of that by you?

3 A. No.

4 Q. Okay. But in any event, to the extent there
5 were questions and answers about how you used the Black &
6 Veatch studies, or why you might have used or not used
7 portions of them, you don't have any reason to believe that
8 your testimony wasn't truthful and accurate?

9 A. No.

10 MR. BUCKLEY: Let's take a break.

11 (A recess was taken from 3:16 to 3:24.)

12 MR. BUCKLEY: I don't have anything further, so
13 I'll turn it over either to the United States or
14 State of Ohio.

15 CROSS-EXAMINATION

16 BY MR. PRICHARD:

17 Q. I have just a few questions. I'm Gary
18 Prichard. I'm associate regional counsel with U.S. EPA,
19 here on behalf of the United States.

20 Dr. Bell, first, Mr. Buckley asked you some
21 questions about sewer moratoriums. One question he didn't
22 ask, are you familiar with how many times in the past a
23 United States District Court judge has ordered a sewer
24 moratorium?